

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

UNITED STATES, *et al.*,

Plaintiffs,

v.

GOOGLE LLC,

Defendant.

No. 1:23-cv-00108-LMB-JFA

**NON-PARTY INDEX EXCHANGE INC.'S SUPPLEMENTAL MEMORANDUM OF
LAW IN RESPONSE TO PARTIES' MOTIONS TO SEAL AND REQUEST FOR
CLARIFICATION**

Pursuant to Local Rules 5(c) and 5(h), non-party Index Exchange Inc. (“Index”), through its undersigned counsel, respectfully submits its Supplemental Memorandum of Law in Response to Parties’ Motions to Seal and Request for Clarification regarding Magistrate Judge Anderson’s August 6, 2024 Order (ECF No. 1128, the “August 6 Order”), which required the Parties to file certain exhibits in redacted form consistent with the rulings therein. Because the August 6 Order did not specifically address certain excerpts containing confidential information of Index, Index respectfully submits this supplemental memorandum regarding continued sealing of this information and requests clarification as to whether the omitted excerpts warrant sealing.

On June 14, 2024, Index filed a Memorandum of Law in Response to various motions to seal submitted by the Parties to this action (ECF Nos. 837, 855) requesting that certain documents containing Index’s confidential information be redacted to protect Index from competitive harm, including certain exhibits filed by Google in connection with its motion for summary judgment. Among other things, Index requested limited, narrow redactions to Exhibit 1 to the Declaration of Bryon Becker in Support of Google LLC’s Motion for Summary

Judgment and Motions to Exclude (ECF No. 581-1, “Exhibit 1”). Exhibit 1 is the Expert Report of Robin S. Lee on behalf of Plaintiffs in this case, dated December 22, 2023.

The August 6 Order addressed every portion of Exhibit 1 that Index sought to keep under seal (through limited redactions) with the exception page 211 n. 725 and a portion of page 229 (the “Index Confidential References”). Because Index is not a party and Exhibit 1 contains confidential information from other non-parties, Index has not directly had an opportunity to review Exhibit 1. As explained in previous filings, Index’s counsel was given descriptions of the relevant exhibits containing its confidential information. This was done to protect the confidential information of other third parties. Based on the Parties’ representations, Index understands that the aforementioned excerpts of Exhibit 1 refer to confidential Index information:

- Exhibit 1, Page 211 n.725 (reference to Index’s take rate); and
- Exhibit 1, Page 229 (reference to Index’s reductions in publisher payouts).

As explained at length in Index’s prior submission, the disclosure of specific facts and numbers regarding Index’s highly sensitive proprietary transactional data would cause significant, irreparable harm to Index and put it at a disadvantage against its competitors, including by equipping Index’s competitors to undercut or acquire Index. *See* ECF No. 837 at 15-19. Courts in this District routinely grant motions to seal similar highly sensitive proprietary information of third parties, including at the trial stage. *See id.* at 19 (citing cases).

In addition, the requested redactions are consistent with previous orders addressing the confidential information of third parties, including Index. *See, e.g.*, ECF No. 902 (“[A]llowing specific information relating to individual take rates or revenue shares by non-parties should remain under seal and is appropriate under the compelling governmental interest standard.”).

For all of the reasons set forth in Index's previous submissions, Index believes the additional references warrant sealing as outlined in its previous filing. *See* ECF No. 837. Accordingly, Index respectfully requests that the Court maintain under seal the following references to Index's confidential information and permit Google to redact them in its filing of redacted Exhibit 1.

- Page 211 n.725 (redacting the specific reference to Index's take rate); and
- Page 229 (redacting the specific reference to Index's reductions in publisher payouts).

A proposed order is attached.

Dated: August 20, 2024

Respectfully submitted,

/s/ Mary C. Zinsner

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